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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1709

AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
Maksis Sneiders, deceased,
Petitioner,

v.

JOHN R. HENRY, JR.
Respondent.

PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VAUGHN E. EVANS
Counsel for Petitioner

Office and Post Office Address:
3205 W. McGraw Street
Seattle, Washington 98199
Telephone: (206) 283-2121

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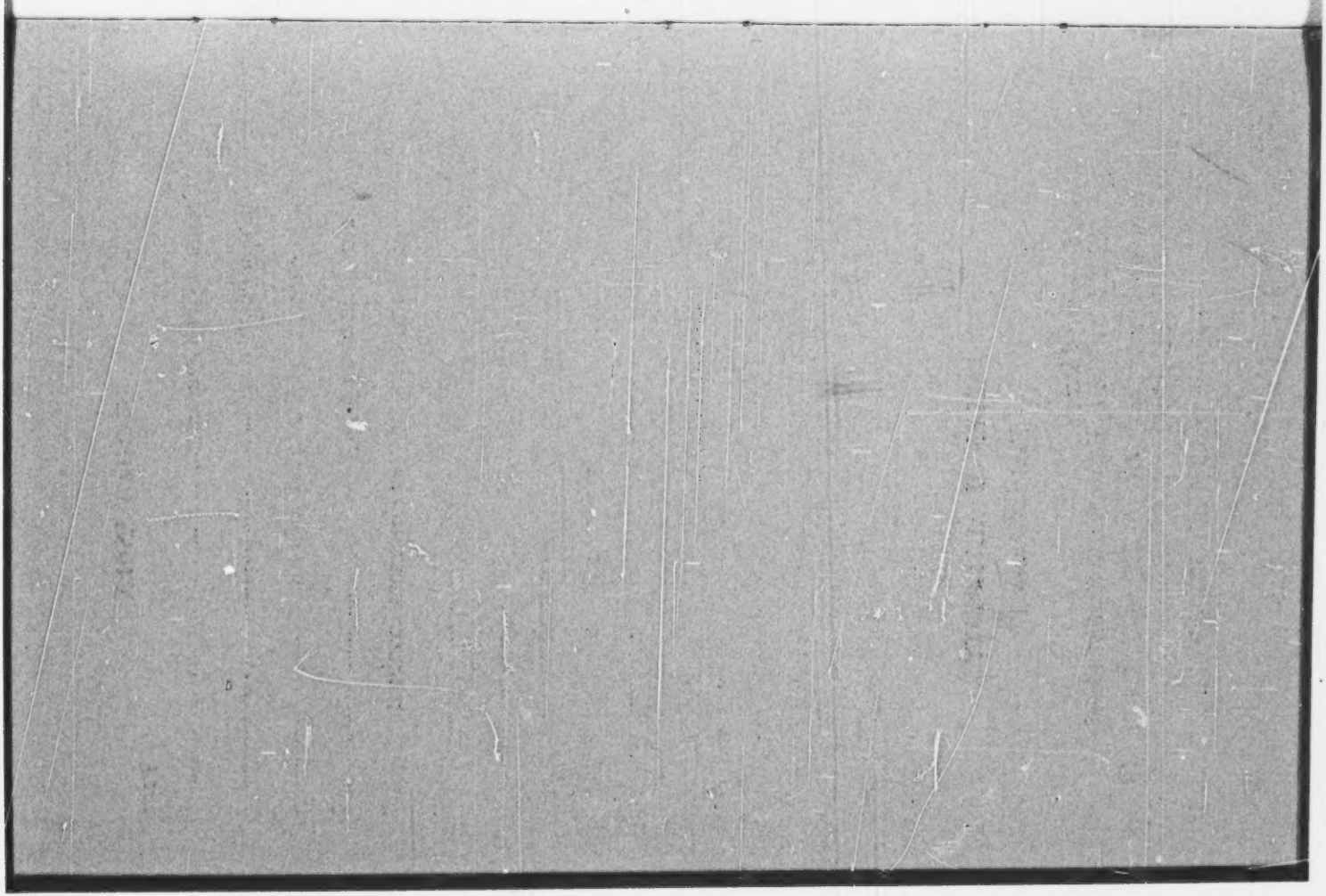

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PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CERTIFICATE OF COUNSEL

Pursuant to Rule 58(2), petitioner prays that Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, 490 F.2d 315, upon substantial grounds available to petitioner, although not previously presented. Counsel for Petitioner hereby certifies that this petition is presented in good faith and not for delay and is restricted to the above specified grounds.

Douglas E. Evans

VAUGHN E. EVANS, *Council for Petitioner*

OPINION BELOW

Opinion below is reported at 490 F.2d, Appendix A hereto.

JURISDICTION

(i) Court of Appeals decision dated January 11, 1974.

(ii) A petition for rehearing duly served and filed January 24, 1974, and denied February 19, 1974 (Appendix B).

Original Petition for Certiorari submitted May 15, 1974, No. 73-1709 and denied October 15, 1974.

(iii) The statutory provisions conferring jurisdiction:

Diversity suit instituted pursuant to 28 USCA 1332; Court of Appeals jurisdiction, 28 USCA 1294; jurisdiction of this Court invoked by 28 USCA 1254.

QUESTIONS PRESENTED

(1) May a husband waive his wife's Fifth Amendment privilege against self-incrimination without violating the due process clause of the Fifth Amendment?

(2) Does the due process clause of the Fifth Amendment permit a trial judge to, sua sponte and without notice, pleadings, evidence or a hearing, order a defendant to produce potentially incriminating records held in her sole and exclusive possession, when she has made a good-faith claim of her Fifth Amendment privilege against self-incrimination?

(3) Does a Federal Court violate the Fifth Amendment due process clause by striking defendant's answer, in toto, including affirmative defenses, and entering a judgment by default as punishment for defendant's concededly good-faith reliance upon her privilege against self incrimination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment reproduced as Appendix C.

Revised Code of Washington, §26.16.030—Appendix D.

Revised Code of Washington §62A.2-327 Appendix E.

STATEMENT OF THE CASE

During the period January, 1967 to May, 1969, plaintiff below, hereinafter referred to as "Henry," ordered merchandise by mail, from petitioner's husband, herein referred to as "Maksis," who operated a mail order business out of his home with the help of his wife, herein referred to as "Amalie." The total purchase price paid for the several written orders was $71,242.68. The terms of the sale were "Immediate Cash Refund If Not Satisfied." In April, 1970, (10 months after the last order) Henry first made known his dissatisfaction with the merchandise received by demand for a refund of the entire purchase price paid, claiming a substantial portion of the merchandise did not conform to his orders. Henry made no offer to return the merchandise. When refund was declined, this suit was instituted against Amalie and Maksis Sneiders and their marital community. Discovery procedures established that Henry had ordered two types of merchandise which for brevity will be classified as "genuine," (consisting of authentic rare stamps actually used for postage) and "non-genuine", consisting of "reprints" (stamps printed from the same plates as genuine, but not sold or used for postage), "specimens" (stamps printed by the issuing authority but not for use as postage), "facsimiles" (non-genuine stamps made to look like genuine stamps), and other various forms of collectors' items not represented to be genuine items.

The liability issue was whether any "non-genuine" merchandise had been substituted for "genuine" merchandise.

Henry claimed the merchandise he ordered had increased in value by 300 percent in the three years since

his first order, and alleged he was entitled to damages in an amount three times the price paid for the merchandise.

Henry admitted in answer to interrogatories he could not describe the merchandise he ordered and had not kept copies of his orders. Henry also declined to describe all the merchandise he had received. Thus Henry had no evidence of the description of the merchandise he ordered and declined to divulge the description of the merchandise he received. Defendants denied the material allegations of the complaint and affirmatively asserted laches as provided by the Uniform Commercial Code, which requires a buyer to "seasonably" exercise his option to return the goods and demand a refund as provided by the Uniform Commercial Code, RCW 62A.2-327 (Appendix E).

After the civil case was commenced, defendants learned that Henry had complained to the postal inspectors and that the United States Attorney was considering presenting an indictment against Maksis on the same allegations as in the civil action. In an attempt to show the United States Attorney the lack of merit in the proposed criminal case, Maksis allowed the United States Attorney to inspect the written purchase orders received from Henry, which demonstrated the volume of non-genuine merchandise Henry had ordered. Since these written orders were the personal property of the marital community, Maksis had the absolute right to authorize this inspection without the permission or authority of Amalie. (See Appendix D, RCW 26.16.030, since amended but the law of the State of Washington at all times material herein, vesting the husband with the sole management and control of the community personal property).

The United States Attorney agreed: (1) not to make copies of the Henry purchase orders, (2) that the inspection was without prejudice to any claim of Constitutional privilege that might later be made, (3) that the contents of the orders would not be revealed to Henry. After inspection, the orders were returned to Maksis and later came into Amalie's possession upon Maksis Sneiders' death. Amalie Sneiders had possession of the only copies of the orders. Their contents could only be proven through production by her and her testimony. Neither the United States Attorney nor Henry could present these orders or their content as evidence in either the civil or the criminal case without the testimony of Amalie Sneiders.

The efforts to dissuade the United States Attorney from presenting the criminal case to the Grand Jury were unavailing. An indictment for mail fraud was returned against both Amalie and Maksis Sneiders on December 10, 1970. Thus, the Sneiders were faced with parallel criminal and civil actions involving the same transactions. Defendants immediately moved to be relieved from being required to make any discovery in the civil case, asserting their Fifth Amendment privilege against self-incrimination.

Defendants thereafter made a request pursuant to Rule 34 that Henry produce the merchandise he actually received for inspection, but Henry refused to do so.

On March 20, 1971, Henry made a request, pursuant to Rule 34, that defendants produce the purchase orders for inspection by Henry and his attorneys. Rule 34 allows 30 days to respond to such a request.

On April 5, 1971, fourteen days before defendants were required under Rule 34 to make any response, the trial judge made an informal request that counsel appear before

him. There was no notice of any issues to be presented or any hearing to be conducted. However, the trial judge proceeded to force counsel to explain why the purchase orders had not been produced for Henry's inspection. The trial court was orally reminded that defendants were claiming their Fifth Amendment privilege against self-incrimination and that there yet remained 14 days before any response was required. Nevertheless, the trial judge proceeded as though he were hearing a motion for sanctions pursuant to Rule 37. No such motion was before the judge, and, indeed, no such motion could have been made until the expiration of the 30 days provided by Rule 34, and then the motion would have to be supported by an affidavit or other evidence showing that the reasons for the refusal to produce the purchase orders were not legally sufficient.

During the course of the discussion, the trial judge revealed that he had personally conducted a factual investigation on his own initiative, without notice to counsel, by reading the clerk's file in the criminal case, which was not assigned to him. From that file the trial judge learned the United States Attorney had been permitted to inspect the Henry orders. However that file did not contain any of the details of the agreements that the prosecutor would not copy, would not reveal the contents to Henry and that such inspection was without prejudice to any claims of constitutional privilege. If due process had been afforded petitioner, by n o t i c e and pleadings, those agreements would have been presented. But the trial judge ruled *sua sponte* without ever affording petitioner an opportunity to present the facts. Thereafter, petitioner tried to bring those facts to the judge's attention, but he simply took the position that he had ruled and the matter was closed.

Without stating any reasons or legal authority, the trial judge *sua sponte orally* ordered defendants to produce the Henry orders for inspection despite the fact that there were no pleadings or other notice that such an order would be considered. The trial judge intended and directed that a written order be entered, but no such written order was ever entered. Consequently, only a *sua sponte* oral order was made. No defendant was personally present.

On May 26, 1971, Maksis died. On June 16, 1971, the United States Attorney dismissed the indictment against Amalie without prejudice to her being reindicted. The statute of limitations had several years to run. Petitioner is not privy to all the reasons why the United States Attorney dismissed the indictment, but it is reasonable that he recognized the impossibility of proving a crime without evidence of the purchase orders and that in the event Henry was able to obtain the purchase orders through discovery in the civil case, a new indictment could be obtained. Henry admitted he was passing the information acquired by discovery to the postal authorities.

On July 9, 1971, the trial judge recognized that the dismissal of the criminal indictment without prejudice did not relieve Amalie Sneiders of her potential criminal liability and that she was entitled to the protection of the Fifth Amendment privilege against testifying against herself in the following language:

> "THE COURT: Well, I would like to get the United States Attorney to let us know one way or the other, because it's kind of becoming a comedy of errors and the discovery is impeded because of her potential criminal liability, if any, and at least, she can say that there is a problem and until it's resolved, then it does inhibit the taking of her deposition, and so forth."

A few minutes later the trial judge lost his temper (as he admitted for the record on August 9, 1971) and the following proceedings occurred:

> "THE COURT: Well, I want all these documents in Mr. Heckendorn's [counsel for Henry] hands prior to that date, [August 9, 1971] or on that date, he can take a default, and you can have your record and put it in any kind of shape you want it. I will have the court reporter here, and you can make a record.
>
> "MR. EVANS: This is not the way the rules provide that this should be done. Now, the rules are binding on me—
>
> "THE COURT: You can put that in the record, your objection to the rules. You have been told three or four times to exhibit those order forms to the plaintiff. Now, he is not going to ask for it again, and I am not going to ask for it again. So you can make your record any way you want to."

This language contains the sole and only reason given by the trial judge for ordering defendants to produce the purchase orders for inspection—to-wit, he had orally directed it to be done. The only prior order was the *sua sponte* April 5, 1971, oral order. The proceedings then continued:

> "THE CLERK: What time will that be scheduled for August 9th, which is a Monday?
>
> "THE COURT: Well, make it ten o'clock.
>
> "THE CLERK: 10:00 a.m., Monday, August 9th.
>
> "THE COURT: Well, arrange for Mr.—
>
> "MR. EVANS: [Addressing the Court Reporter]: May I have a copy of this immediately? Because I don't know what I am going to do, but I've got to do something.
>
> "THE COURT: Well, you be ready to give those papers to Mr. Heckendorn, or you will be in jail, that's

what's going to happen. You will be in contempt of Court. So he can also proceed with his default.

"MR. EVANS: Would you care to fix my bond now, Your Honor?

"THE COURT: No, I will fix bond at the time, on August 9th at ten o'clock."

Thereafter, on August 9, 1971, the trial judge stated in part as follows:

"THE COURT: Well, I have not imputed, and don't intend to impute any bad faith to Mr. Evans. I think that when *I lost my temper* the other day and told him he had to turn those papers over to you, *because it had been several months since he had been instructed to do that,* I said if he did not turn them over, I would have the Marshall take charge of him, but *I didn't mean to impute bad faith,* or any intentional misstatement . . . . Well, I will tell you, I will take one bit of advice from your lawyer. Mrs. Krug made a point, which I think is valid, and that is that your consumacious (sic) behavior is based upon a *good-faith opinion* that your client needs the protection of the Fifth Amendment at all costs in this case . . . *You have to resist turning these papers over, in good faith.* I am willing to accept your *good faith,* and I'm not going to put you in jail. I think your courage is commendable . . . ."
[Emphasis supplied].

In the foregoing quotation, the trial judge openly admits that his sole reason for ordering defendants to produce the purchase orders for inspection was the fact that he had orally "instructed" that it be done. That assertion can only refer to the proceedings on April 5 and July 9, 1971, when, without notice, pleadings or evidence the trial judge, *sua sponte,* orally ordered production for inspection.

Thereafter, Amalie Sneiders personally claimed her Constitutional privilege against self-incrimination by affidavit dated September 15, 1971. On October 19, 1971, without

further notice, hearing or evidence, the trial court entered an order of default, reproduced herein as Appendix F, wherein he admits the default is punishment for Amalie refusing to comply with the order of the court, which was in fact only a *sua sponte* oral order, made without notice, evidence or pleadings.

Judgment was rendered against petitioner in the sum of $235,338.89, without allowing her an opportunity to present any of the many defenses on the issues of liability.

REASONS FOR GRANTING CERTIORARI

First Question Presented

The Court of Appeals refused to reverse the entry of the order of default solely upon the excuse that Maksis Sneiders permitted the United States Attorney to inspect the Henry orders. The Court of Appeals ruled that petitioner's husband had waived petitioner's Constitutional privilege against self-incrimination in the following language:

> "Under an agreement between the prosecutor and *appellant's husband,* the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not have tended to incriminate the defendant." [Emphasis supplied].

Whether the Court of Appeals was moved by the fact that Maksis was of the male sex or that as a husband he had the right to waive Amalie's Constitutional privilege against self-incrimination, would seem to be unimportant. The basic fact is Amalie did nothing, either voluntarily or involuntarily, to waive her Constitutional privilege. She had steadfastly maintained her assertion of the Constitutional privilege against self-incrimination, first through

counsel and later through her personal affidavit. Waiver of a constitutional privilege cannot be inferred or presumed. It can only be accomplished by knowing and intentional conduct. *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed 2d 694, 86 S. Ct. 1602; *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461 (1938); *Glasser v. United States,* 315 U.S. 60.

The Court of Appeals gives us no citations of authority and we have been unable to find any. It is, therefore, conclusively established that the Court of Appeals *invented* this new and devastating theory that marriage vows transfer a wife's right to assert or waive her Constitutional privilege to the husband—in short reduces her to a second class citizen. Unless this court concurs with the underlying premise, inherent in the opinion of the Court of Appeals, that wives are mere chattels whose destinies are legally controlled by their husbands, certiorari must be granted. The opinion of the Court of Appeals invites zealous prosecutors and capricious judges to rely on it as an instrument of oppression.

This new and unique theory of law can only be corrected by this Court granting certiorari. Until this decision was published, it was universally settled that a waiver of silence in one proceeding did not waive that privilege in any other proceeding as set forth in 58 Am. Jur. *Witnesses,* §99 at page 82 as follows:

> "A person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it *as to the same matter* in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined *without reference to what he said when testifying as a witness on some other trial, or on former*

trial of the same case, and without reference to his declarations at some other time or place." [Emphasis supplied].

In *Couch v. United States*, 409 U.S. 322, 34 L.Ed. 2d 548, 93 S.Ct. 611 (1973) this Court reasserted the fundamental premise that the Fifth Amendment privilege is a personal privilege, and that it inheres basically to the person, and not to the information that may incriminate him.

Neither the plaintiff in the civil case or the government in the criminal case could prove a prima facie case without the purchase orders. If Amalie voluntarily produced her records for Henry's inspection, he could then testify to the contents in both the civil and criminal cases. But if Amalie Sneiders did not voluntarily produce the orders, but retained them in her possession, no one could lawfully force her to produce them in either the civil or criminal case. It was, therefore, essential that Amalie Sneiders preserve her rights to remain silent in the civil case to preserve her rights in the criminal case. The trial judge, nevertheless, ignored her rights by ordering her to produce the orders in the civil case. The Court of Appeals, relying solely on conduct of the now deceased Maksis Sneiders, upheld the trial judge.

The Court is reminded that in *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886) the court held that the privilege against self incrimination applies to papers in the possession of the person asserting the privilege. Those same facts prevail here. The only copies of the orders in existence are in the possession of the petitioner. *Boyd* was reaffirmed in *Couch* and is still the law today. Petitioner had a right to claim her Constitutional privilege even if she had stolen the documents, since they were in her sole control and custody.

Second Question Presented

This court promulgated rules of Civil Procedure to insure uniform due process in all trial courts. Rule 34 specifically provides the procedural steps by which one litigant may request his opponent to produce documents for copying and inspection. The rule allows the requested litigant thirty (30) days to make a response. That response, if an objection, must set forth the reasons for the objection. If the party seeking the inspection considers the reasons for the objection inadequate, he may invoke the provisions of Rule 37, and move for an order requiring production. That motion must set forth his legal position, and be served and noted for a hearing. This allows the opposite party an opportunity to be heard and to present his legal position before a decision is made. This is due process. Had it been followed by the trial judge, petitioner would not be here today.

The procedures prescribed by this court in Rules 34 and 37 spell out due process. When a trial judge ignores these rules, and issues an oral order *sua sponte* without giving a party an opportunity to be heard, the due process clause of the Fifth Amendment is violated. It seems incredible that the petitioner should be singled out as one who is not entitled to the due process described by the rules. Nevertheless, she was so deprived of that due process and the Court of Appeals affirmed.

Petitioner had a right to expect the trial court to obey the rules prescribed by this court. When the trial court refused, the petitioner had a right to expect the Court of Appeals to reverse. It did not. Petitioner now has a right to expect this court to enforce its rules.

The conduct of the trial court is clearly contrary to the edict of this court in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S. Ct. 841 (1897). The order of default here was not entered because of any admission based on a refusal to produce, but solely and only as punishment for refusal to obey the *sua sponte* oral order. See Appendix F setting out the order of default. The order clearly is not in aid of the court's processes but solely as punishment. The decision in *Hammond Packing Company v. Arkansas*, 212 U.S. 322, 53 L. Ed. 530, 29 S. Ct. 370, (1909) recognizes this distinction.

Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 2 L.Ed. 2d 1255, 78 S.Ct. 1087 (1958) recognizes that there are constitutional limitations on the power of the courts, even in aid of their own process, and this case falls squarely within those limitations.

Unless this court sanctions a trial court's disregard of due process as set out in the rules of procedure, certiorari must be granted to insure equal justice in all federal courts.

As discussed in more detail in the next section, due process requires among other things, that the issues to be decided be raised by pleadings. *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897) stated in part at 446:

> "There is no distinction in principal between determining a cause upon *issues not raised by the pleadings* in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the plead-

ing containing such defense from the files." [Emphasis supplied].

There were never any pleadings before the trial judge raising any issues relating to production for inspection. The trial judge simply assumed the role of an advocate and ruled, without pleadings, evidence or notice, and in the absence of petitioner.

"Equal justice for all" becomes a mockery if this court permits this unbridled abuse of power to go unchecked. No one can ever be safe from judicial caprice in a federal court if this Court fails to correct the errors here presented.

Third Question Presented

At all relevant times during the pendency of the civil action, petitioner was either under indictment for mail fraud involving exactly the same transactions alleged in the civil suit, or faced the very real threat of reindictment. This undisputed fact entitled petitioner to assert the right to remain silent. See *deAntonio v. Solomon*, 42 FRD 320 (1967) and cases cited therein. This Court has recognized that the Fifth Amendment privilege against self-incrimination is available in a civil case as well as in a criminal case, and the law pertaining thereto is the same. *United States v. Kordel*, 397 U.S. 1, 25 L.Ed. 2d 1, 90 S.Ct. 763 (1970). Due process gave petitioner the right to avail herself of the privilege against self-incrimination in this civil action. Similarly, this Court has recognized that the right to claim one's Fifth Amendment privilege is personal. *Couch v. United States*, 409 U.S. 322, 34 L.Ed. 2d 548, 93 S.Ct. 611 (1973). In view of the fact that: (1) the United States Attorney had merely inspected the Henry purchase orders and had not made any copies, and that (2) the federal investigation was a different proceeding

from the civil action of *Henry v. Sneiders*, the production of records by Maksis Sneiders for inspection by the United States Attorney's staff would not constitute a waiver of petitioner's right to refuse to testify or produce the same physical evidence in any subsequent independent proceeding. See *Glotzbach v. Klavans*, 196 F. Supp. 685 (ED Va. 1961); *Ottomano v. United States*, 468 F.2d 269 (1st Cir. 1972) *cert. den.*, 93 S.Ct. 948 holding "that the waiver of privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding"; *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958) holding that the waiver of the privilege against self-incrimination in making statements to the FBI does not deprive the accused of the right to invoke the privilege in the grand jury hearing; *In re Neff*, 206 F.2d 149 (3d Cir. 1953) holding that a witness who testified "before the grand jury did not thereby waive her right to claim her constitutional privilege against self incrimination as to the same subject matter when called as a witness in the subsequent trial." *United States v. Goodman*, 289 F.2d 256 (4th Cir. 1961) holding, "A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked." *Poretto v. United States*, 196 F.2d 392 (5th Cir. 1952) holding, "the constitutional privilege attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding."

The Fifth Amendment privilege against self-incrimination protects one from being compelled to be a witness against himself. The privilege is not contingent upon privacy or secrecy, but, on the contrary, stands for the proposition that under our system of justice " . . . prosecutors

are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." *United States v. White*, 322 U.S. 694, 698 (1944).

As a result of petitioner's admittedly "*good faith*" assertion of her Fifth Amendment privilege against self-incrimination, the trial court, on October 19, 1971, entered an order of default finding that, "acts by the Defendants and their counsel constitute a willful obstruction of justice and contempt of Court." Appendix F. The order of default on October 19, 1971, also struck petitioner's answer and she was completely foreclosed from asserting any defense on the issue of liability. As a result she is now deprived of $235,338.89.

This court, as well as text writers, has recognized that there are Constitutional limitations upon the powers of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. In *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed. 2d 1255 (1958) the Court said at page 209:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841, and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L. Ed. 530, 29 S. Ct. 370, 15 Ann. Cas. 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

If the decision in the District Court, as affirmed by the Ninth Circuit Court of Appeals, is allowed to stand, then a

party who is either under indictment or threatened with indictment will be forced to make an election between availing himself of the due process clause of the Fifth Amendment, insuring him of a hearing on the merits before his property may be taken, or the Fifth Amendment privilege against self-incrimination protecting him from being forced to be a witness against himself. Failure to grant certiorari will be tantamount to reversing *Garrity v. New Jersey*, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967), condemning the duress inherent in a choice between a "rock and whirlpool."

This court has recognized that the due process clause of the Fifth Amendment is an ephemeral concept incapable of precise definition. The often-quoted statement of Daniel Webster probably comes closer than any other in defining the meaning of due process of law:

> "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." *The Trustees of Dartmouth College v. Woodward*, 4 Wheat [U.S.] 518, 4 L. Ed. 629 (1819).

In *Goldberg v. Kelly*, 397 U.S. 254, 267, 25 L. Ed. 2d 287, 299, 90 S. Ct. 1011 (1970), the court said,

> "The fundamental requisite of due process of law is the opportunity to be heard."

And in *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S. Ct. 205, 25 ALR 2d 1396 (1951), this court said at page 172:

> "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no im-

> mediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 52 L. Ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560, on a judgment not *ad hoc* and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society."

In *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033 (1912) this court said at page 161:

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In yet another attempt to describe the meaning and limits of the Constitutional requirement of due process of law, this court in *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 ALR 527 (1932) said at page 68:

> "It never has been doubted by this Court or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. . . . In *Holden v. Hardy*, 169 U.S. 366, 389, 42 L. Ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable

> principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' and Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L. ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

This Court has heretofore considered the due process limitation on the imposition of sanctions for failure to make discovery in three cases. In *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S. Ct. 841 (1897), defendant was held in contempt of court, his answer stricken, and a decree pro confesso entered against him because of his refusal to obey an order to pay over a sum of money into the court registry. Justice White, in an exhaustive analysis of the common law power to punish for contempt and of the origins of the due process clause, posed the question at page 413:

> ". . . whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, supress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. *The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer.*" (Emphasis supplied)

The court continued at page 414:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts

> have inherent power to deny *all right to defend an action* and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

The court further noted at page 446:

> "There is no distinction in principal between determining a cause upon *issues not raised by the pleadings in the actual absence of the party,* and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files. [Emphasis supplied]

In the later case of *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas., 645 (1909), this court construed a statute and an order entered pursuant to its provisions to hold that any reasonable showing of an inability to comply with the statute and order would have satisfied the requirements of both, and that Hammond had in fact failed to make such a showing.

The court in the *Hammond* case distinguished *Hovey* in the following terms at page 351:

> "The difference between mere punishment, as illustrated in *Hovey v. Elliott,* and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other.'. . .

An issue in the present case is whether, in a civil action,

the production of potentially incriminating physical evidence may be "lawfully called for" in view of an admittedly "*good faith*" assertion of the Fifth Amendment privilege against self-incrimination. If such production cannot "lawfully be called for" then it would follow that the sanction of entry of default judgment cannot lawfully be imposed without violating the due process clause of the Fifth Amendment.

In *Societe Internationale v. Rogers, supra,* this court found both the *Hovey* and *Hammond* cases to leave open the question whether due process is violated by the striking of a complaint when there has been a "*good faith*" effort to comply with a discovery order. The court noted at 357 U.S. 210:

> "These two decisions leave open the question whether the Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the court in the *Hammond* case might well falter under such circumstances. Cf. *Tot v. United States,* 319 U.S., 463, 87 L.Ed. 1519, 63 S.Ct. 1241. Certainly substantial Constitutional questions are provoked by such action."

While noting the Constitutional questions provoked by such action, this Court avoided a resolution of the due process question by construing FRCP 37 (b) to mean that a failure to comply with a discovery order would not justify a dismissal or default unless such failure afforded a reasonable basis to presume an admission of want of merit in the claim of defense. No such presumption is permissible in the case at hand.

State court decisions, which have considered the Con-

stitutional limitations of due process upon the court's power to punish for contempt have reached the conclusion that the presumption of lack of merit can go no farther than the bounds of the production order involved. In *People v. George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935) the Court said at page 305:

> "The courts can never grant judgment depriving a defendant of his liberty or property unless there has been opportunity to defend the action. Without opportunity to meet a charge, there is no due process of law. *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215. No court can grant such a judgment without a hearing, and a refusal to hear is a denial of due process."

The Washington State Supreme Court in *Mitchell v. Watson*, 58 Wn.2d 206, 361 P.2d 744 (1961) considered this same issue. Watson, a newspaper reporter defendant in a libel action was served with written interrogatories seeking disclosure of the source of information for a story written by defendant. Watson refused to divulge the source and was subsequently held in contempt of court. A default judgment was entered against him. The Supreme Court of the State of Washington reviewed the *Hovey*, *Hammond*, and *Society Internationale* decisions, as well as other state court decisions on the subject, and concluded at page 214:

> "The contumacy of a party disobeying an order of a court may justify his punishment for contempt, but it does not justify the deprivation of his civil rights or the taking of his property and giving it to another."

After analyzing the authorities, the court stated at page 216:

> "(a) A defendant who refuses to make discovery may be adjudged in contempt of court and punished. [cites omitted]

(b) The court may, as 'other consequences, . . . make such orders in regard to the refusal as are just . . .'; but cannot deny to defendant the right to defend the action as 'mere punishment.' Defendant cannot be deprived of a constitutional right.

(c) The purpose of the court's order shall be to balance the rights of the parties so that the contemptor does not profit or benefit from his contemptuous act.

(d) The court may presume and infer, as a matter of law, that the evidence withheld by defendant would, if produced, contradict the contemptor's contentions and support the contentions of plaintiff. The truth of matters thus presumed to be established may result in drastically limiting defendants' proof or in striking all or part of pleaded defenses."

Charles Allen Wright, a noted authority on the Federal Rules of Civil Procedure, in discussing this issue commented in 8 Wright and Miller, *Federal Practice and Procedure*, §2283, pp. 763-64:

"Another aspect of the constitutional problem does not seem to have been discussed in the federal cases though it has arisen occasionally in state litigation. It is illustrated by a state court case in which a newspaper reporter, sued for libel, wilfully refused to answer interrogatories asking the names of his informants, if any, for the article he wrote. It was held error to strike his answer and enter judgment against him for this failure. The court held that defendant could properly be punished for contempt and that the court was free to presume that the reporter had no informant or that the informant did not make the statement in question, but that he could not be denied his day in court on other issues in the case to which the existence of an informant would have no relevance. To go beyond this, and bar the party on issues unrelated to his failure to disclose, cannot be supported on the presumption rationale of *Hammond* and would seem to exceed constitutional limits."

Since federal jurisdiction was based on diversity of citizenship, the law of the State of Washington is controlling. It does not appear that there is any difference in the federal concept of due process and that stated by the Washington Supreme Court in *Mitchell*, but if there is, the Washington law applies. Under *Mitchell* no order of default could be entered.

The petitioner had defenses available which were not related to the purchase orders. By entering an order of default she was denied all rights to defend. This was clearly a denial of due process. Certiorari should be granted.

Respectfully submitted,

VAUGHN E. EVANS
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR.,
Plaintiff-Appellee,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased,
Defendant-Appellant.

No. 72-2096

[January 11, 1974]

Appeal from the United States District Court for the Western District of Washington

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.*

PER CURIAM:

This is an action for fraud and breach of contract arising from the sale of rare stamps through the mail. The plaintiff alleged that the defendants, Amalie Sneiders and Maksis Sneiders, who is now deceased, sold counterfeit stamps, misrepresented by them to be genuine, to the plaintiff. Proceeding under Fed. R. Civ. P. 34, plaintiff sought discovery of certain records concerning the disputed transactions. Following defendant's repeated refusal to produce these records, the district court entered default judgment in favor of the plaintiff pursuant to Fed. R. Civ. P. 37(b)(2).[1] Defendant appeals, and we affirm.

*Of the District of Oregon.

1. If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

We consider appellant's six assignments of error separately.

1. *Were the defendant's records protected by the privilege against self-incrimination?* After the commencement of this civil action, the appellant and her husband were indicted for mail fraud, the indictment being based in part on the sale of stamps to the plaintiff. The indictment against the defendant was dismissed following the death of her husband, but the dismissal was without prejudice. Since the defendant was subject to criminal prosecution for the transaction at issue in the instant civil case, she claims that records concerning that transaction are protected by the Fifth Amendment privilege against self-incrimination.

The claim is without merit. Under an agreement between the prosecutor and appellant's husband, the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not have tended to incriminate the defendant. Any incriminating information was already in the hands of the prosecuting authorities.

2. *Was the default judgment greater in amount or different in kind than that prayed for in the complaint?* Fed. R. Civ. P. 54(c) provides that a

> judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

The appellant argues that the judgment was different in kind from that prayed for in that it ran against her personally rather than as a member of the marital community. The plaintiff, however, prayed "for judgment against the defendants *and each of them, and* the marital community composed of them." (Emphasis added.) Therefore, the personal default judgment conformed to the pleadings.

The appellant also argues that the default judgment for $235,338.89 exceeded the $71,243.68 prayed for in the complaint. That part of the prayer, however, was for the amount that the plaintiff had paid to the defendants. In addition, plaintiff prayed for additional damages for breach

of contract, the amount of which was to be proved at trial.[2] The prayer was not limited to $71,243.68, and the default judgment did not exceed the amount prayed for.

3. *Should the district court have granted summary judgment in favor of defendant?* Appellant argues that plaintiff lacked sufficient evidence with which to prove his case and that summary judgment against him should have been awarded. Any insufficiency of the plaintiff's evidence was a direct result of appellant's refusal to comply with a legitimate request for discovery. The assignment of error is, therefore, entirely without merit.

4. *Should the trial judge have been disqualified for prejudice?* Appellant draws our attention to a number of dialogues between the trial judge and appellant's counsel in an effort to show prejudice on the part of the trial judge. The trial judge understandably expressed dissatisfaction and frustration over appellant's repeated refusals to produce the records. But our review of the record reveals that, notwithstanding this understandable frustration, the trial judge was extremely fair to the appellant and her claim of privilege. She was given repeated opportunities to produce the documents and avoid a default judgment, but she continued to refuse.

There is no evidence whatsoever of prejudice or improper conduct on the part of the trial judge.

5. *Was appellant entitled to a jury trial on the issue of damages?* After entering default judgment on the issue of liability, the district court held a hearing to determine the amount of damages. Although appellant had asked for a

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2. Plaintiff prayed as follows:

"By reason of breach of the contract, misrepresentation, and fraud of the Defendants, Plaintiff has suffered a direct loss of the purchase price in the amount of $71,243.68, *together with additional amounts* not yet fully determined for appraisal examination costs, *loss of the value of the stamps as represented*, legal expenses and attorneys' fees, embarrassment, anxiety, and loss of health, the full amounts of which Plaintiff will prove at the time of trial. . . .

"WHEREFORE, Plaintiff prays for judgment against the Defendants *and each of them*, and the marital community composed of them, in the sum of $71,243.68 damages for funds fraudulently procured, *and for Plaintiff's other damages as are proved at the time of trial, together with interest and costs.*" (Emphasis added.)

jury on that issue, the court denied the request and proceeded without a jury.

Fed. R. Civ. P. 55(b)(2) authorizes a district court to hold an evidentiary hearing following a default judgment to determine damages.[3] The Rule preserves the right of trial by jury "when and as required by any statute of the United States." Appellant cites no "statute of the United States" requiring a jury trial under these circumstances. Nor is this court aware of any such statute. Therefore, the Rule does not itself require a jury trial on the issue of damages.

Nor does the appellant have a constitutional right to a jury trial under these circumstances, since the Seventh Amendment right to trial by jury does not survive a default judgment. *Brown v. Van Braam*, 3 U.S. 344 (1797); *Midland Contracting Co. v. Toledo Foundry and Machine Co.*, 154 F. 797 (7th Cir. 1907); *Johnson v. Bridgeport Deoxidized Bronze and Metal Co.*, 125 F. 631 (C.C.D. Conn. 1903); *Raymond v. Danbury & N.R. Co.*, 20 F. Cas. 332 (No. 11,593) (C.C.D. Conn. 1877); *Gill v Stolow*, 18 F.R.D. 508 (S.D.N.Y. 1955), *rev'd on other grounds*, 240 F.2d 699 (2d Cir. 1957); 6 *Moore's Federal Practice* ¶55.07.

6. *Was the appellant denied a fair opportunity to offer evidence on the issue of damages?* Appellant argues that she was precluded from offering evidence at the hearing to determine damages. Although some evidence was excluded, it would have been relevant only as to liability and, since liability was not then an issue, the evidence was properly excluded as irrelevant. Appellant draws our attention to no excluded evidence which was relevant to the issue of damages.

Although she does not explicitly assign it as error, the appellant also argues that the district court made no formal

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3. "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or *to determine the amount of damages* or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and *shall accord a right of trial by jury to the parties when and as required by any statute of the United States.*" Fed. R. Civ. P. 55(b)(2). (Emphasis added.)

order for discovery. Since default under Fed. R. Civ. P. 37(b)(2) is permitted only for refusal to comply with a *court order* for discovery, appellant argues that default was improper. It is true that the district court did not issue a written order directing the appellant to produce the records. It is clear from an examination of the oral proceedings, however, that the district court had orally ordered appellant to produce the records. Where oral proceedings unequivocally give a litigant notice that certain documents are to be produced, the absence of a written order does not preclude the entry of a default judgment for failure to comply. *See Jones v. Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967); *Moore's Federal Practice*, ¶37.03.

Each of appellant's assignments of error is without merit. The judgment of the district court is affirmed.

The mandate will issue at once.

APPENDIX B

FILED

Feb. 19, 1974

U.S. Court of Appeals

DOCKETED

[Superimposed by Rubber Stamp]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR., *Plaintiff-Appellee,* v. AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased, *Defendant-Appellant.*	No. 72-2096 ORDER DC 9813 ATG

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Duniway and Wright voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

APPENDIX C

AMENDMENT [V.]

Capital crimes; double jeopardy; self incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

Revised Code of Washington

26.16.030 Community property defined—control of personalty. Property not acquired or owned[,] as prescribed in RCW 26.16.010 and 26.16.020[,] acquired after marriage by either husband or wife or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

APPENDIX E

Revised Code of Washington

62A.2-327 Special incidents of sale on approval and sale or return

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) Use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

(b) the return is at the buyer's risk and expense.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOHN R. HENRY, JR., *Plaintiff,* v. MAKSIS SNEIDERS and AMALIE SNEIDERS, *Defendants.*	No. 8913 ORDER OF DEFAULT

THIS MATTER came on regularly before the undersigned Judge sitting in the above entitled Court on August 9, 1971, pursuant to Order for Delivery of Documents or, alternatively, for a Default Judgment in accordance with Order entered July 9, 1971. The Plaintiff was represented by his attorneys, Heckendorn & Judd, C. Henry Heckendorn of counsel, and the Defendant, Amalie Sneiders, personally and as Personal Representative for Maksis Sneiders, deceased, was represented by her attorney, Vaughn E. Evans. The Court inquired whether or not the Defendant, Amalie Sneiders, or her attorney, Vaughn E. Evans, had complied with the foregoing Order of Court dated July 9, 1971, directing them to deliver at once to Plaintiff's attorneys for examination and for copying the originals of all orders for stamps delivered by the Defendants to the Plaintiff and the Court was advised that such orders had not been delivered. The Court thereupon directed the Defendant, Amalie Sneiders, personally and as Personal Representative of the Estate of Maksis Sneiders, deceased, through her attorney, Vaughn E. Evans and also ordered her attorney, Vaughn E. Evans, to deliver copies of all such orders to Plaintiff's counsel at this time. Counsel for Defendants refused and failed to comply with the above Order to Produce orders and with the previous Pre-Trial Orders herein, and gave no justifiable reason for not doing so. The Court finds that acts by the Defendants and their counsel constitute willful obstruction of justice and contempt of Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the pleadings herein of Maksis Sneiders and Amalie Sneiders, his wife, and Amalie Sneiders, individually and as Personal Representative of the Estate of Maksis Sneiders, deceased, be and they are hereby stricken, and said Defendants and each of them be and they are hereby found and declared to be in default and Plaintiff is authorized to present evidence in support of his Complaint herein.

DATED this 19th day of October, 1971.

s/ ALFRED T. GOODWIN
Alfred T. Goodwin
Judge

Presented by:
s/ C. HENRY HECKENDORN
C. Henry Heckendorn
Of counsel for Plaintiff